CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 27 NOVEMBER 10, 1993 NO. 45

This issue contains:

U.S. Customs Service
T.D. 93–87
General Notices
U.S. Court of International Trade
Slip Op. 93–202 Through 93–205
Abstracted Decisions:
Classification: C93/122 Through C93/129

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decision

19 CFR Part 133

(T.D. 93–87)

EXCHANGE OF BRIEFS IN COPYRIGHT INFRINGEMENT ACTIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to provide that in cases where imported goods are detained by Customs on suspicion of copyright infringement, the importer and copyright owner, before submitting documents to Customs supporting their views in regard to the disputed claim of infringement, shall first provide each other with a copy of all briefs and related materials. The same procedure shall be followed regarding any follow-up rebuttal arguments. The submission of all material relating to the disputed claim of infringement to Customs must be accompanied by a written statement confirming that a copy has already been provided to the opposing party.

Also, in this connection, the Customs Regulations are amended to provide that when the copyright owner has posted the required bond necessary to protect the importer from possible loss or harm should the detained article be found noninfringing, such bond may not be withdrawn by the copyright owner until a decision on the issue of infringement has been reached.

Affording each party the opportunity, as a matter of course, to view and respond to the opposing presentation will result in reduced costs and increased efficiency by eliminating individual requests having to be processed by Customs under the freedom of Information Act to obtain these materials, in addition to producing more accurate and better-informed follow-up submissions by these parties, and better decision-making by customs.

EFFECTIVE DATE: November 26, 1993.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, International Trade Compliance Division, (202–482–6960).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Currently, § 133.43(c)(1) of the customs Regulations (19 CFR 133.43(c)(1)) provides that in cases where goods are detained by Customs on suspicion of copyright infringement, the importer and the copyright owner may submit legal briefs and other pertinent materials to Customs in support of their respective positions on the disputed claim of infringement. These submissions are forwarded to Customs Headquarters for decision. Frequently, the copyright owner and importer will request a copy of the other's brief and related materials under the Freedom of Information Act (FOIA), 5 U.S.C. 552, following which rebuttal arguments are then usually made to Customs.

By notice published in the Federal Register on July 10, 1992 (57 FR 30703), it was proposed to amend § 133.43(c)(1) to permit the exchange of briefs in copyright infringement actions. Specifically, the proposed amendment of § 133.43(c)(1) provided that in cases where imported goods were detained on suspicion of copyright infringement, the importer and copyright owner would furnish each other with a copy of all additional evidence, briefs, or other material, which each thereafter intended to submit to Customs in regard to the disputed claim of infringement, and would accompany the submission of this information to Customs with a written statement confirming that a copy had already been provided to the opposing party.

Concomitant with this, the notice further proposed to amend § 133.43(c)(4) to expressly provide that once a copyright owner posted the required bond necessary to protect the importer from possible loss or harm should the detained article be found noninfringing (see § 133.43(b)(2)), such bond could not be withdrawn by the copyright owner until a decision on the issue of infringement was reached.

As observed in the notice, affording each party the opportunity to routinely view and respond to the opposing presentation would result in reduced costs and increased efficiency for Customs by eliminating individual requests having to be processed under the FOIA to obtain these materials, in addition to producing more accurate and better informed follow-up submissions by these parties, and better decision-making by Customs.

Five commenters responded to the notice of proposed rulemaking. One commenter made a number of recommendations concerning Customs handling of copyright infringement matters in general, but did not specifically address the merits of the proposed amendments under consideration. A description of the specific issues that were raised with respect to the proposal under review, together with Customs analysis thereof, is set forth below.

DISCUSSION OF COMMENTS

Comment:

It is asserted that proposed § 133.43(c)(1)(i) is too limited in that a copyright owner would apparently only have to furnish the importer with any "additional" evidence which is thereafter submitted to Customs to substantiate an initial claim of infringement, thus excluding any evidence which may have accompanied the initial claim itself. It is further declared that the importer should have a full opportunity, in advance of defending the claim of infringement, to review and respond to all evidence which is to be considered by Customs, regardless of the timing or circumstance of the submission, or the formality or informality thereof.

Response:

Customs intent by this regulation is to afford each party the opportunity to view and respond to the opposing presentation without the burden of having to resort to the FOIA to obtain these materials, thereby reducing costs, increasing efficiency, and facilitating better decision-making by Customs. To this end, § 133.43(c)(1)(i), as proposed, basically states that before submitting the additional materials to Customs, the importer and copyright owner must first provide each other with a copy of *all* such information. Thus, the language used in the proposed amendment is intended to permit both the importer and the copyright owner an equal opportunity to review the same evidence which will later be reviewed by Customs, including evidence accompanying the initial claim or denial of infringement.

To avoid confusion on this score, § 133.43(c)(1)(i) is revised to make clear that the exchange of information includes the initial claim or denial of infringement. Furthermore, to ensure that all evidence, including rebuttal arguments, will be made available to both parties, § 133.43(c)(1)(i) is revised to provide that during the period within which rebuttal arguments may be made to Customs, each party shall first furnish the other with a copy of all such rebuttal material before timely submitting it to Customs, and that no other material will be accepted by Customs from either party in regard to the disputed claim of infringement after the 30-day rebuttal period expires.

Comment:

Proposed § 133.43(c)(1)(i) should be more specific in terms of the timing and mechanics relating to the exchange of information.

Response:

Customs believes that § 133.43(c)(1)(i), as revised, clearly requires that the exchange of information between the importer and the copyright owner take place within the initial 30-day period specified in § 133.43(c)(1), and that the exchange of rebuttal arguments take place during the 30-day rebuttal period and before their submission to Customs.

Comment:

Proposed § 133.43(c)(1)(i) fails to allow for the respective parties to the dispute to test the accuracy of the information which each submits to the other and to Customs. It is suggested that the amendment allow for depositions, as well as for the production of relevant documents underlying the evidence presented, so that assertions of fact can be explored and examined for accuracy.

Response:

Customs is satisfied that the current administrative practices which it follows in copyright infringement cases permit a complete and accurate review at the agency level.

Comment:

To further facilitate the exchange of briefs, it is proposed that Customs provide the importer and the copyright owner with the name and address of the proper party to receive the briefs. It is noted that if one or both parties are large corporations, the identity of the proper person to receive the briefs is essential to avoid delay and confusion. It is also suggested that the proposed amendment require that the brief be sent by certified mail, with a return receipt requested, in order to reduce the number of disputes as to whether the brief was timely submitted to the opposing party.

Response:

Customs believes that the present procedures furnish sufficient information to enable the receipt of briefs by the appropriate parties, and that the parties involved should be personally responsible for ensuring that a timely exchange has taken place.

Comment:

The time period for the exchange of briefs should be shortened; as proposed, it is unduly long and further extends the detention period of the imported article, thereby causing irreparable injury to the importer. In this connection, the importer should be given the option of posting a bond in order to permit the continued importation of the allegedly infringing article during this time, with Customs allowing the parties to present arguments on the amount of any bond imposed either on the copyright owner or the importer.

Response:

It is Customs opinion that the time periods set forth in the final rule are necessary in order to allow the parties adequate opportunity for the preparation and exchange of briefs, as well as for the review and rebuttal thereof. Nor should these time periods cause undue injury to the importer. In this latter regard, the importer may raise any concerns about the amount of the copyright owner's bond with the appropriate district director of Customs who specifies the amount of this bond, which amount must be sufficient to protect the importer from possible harm should the detained article be found noninfringing.

Comment:

The proposed amendments should be implemented by Customs as quickly as possible.

Response:

The final rule in this matter will become effective 30 days following its publication in the Federal Register, as provided under the Administrative Procedure Act.

CONCLUSION

After careful consideration of the comments received and further review of the matter, Customs has concluded that the amendments, with the modifications discussed above, should be adopted.

REGULATORY FLEXIBILITY ACT

Based on the explanation given in the preamble, it is certified, under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

It has been determined that these rules do not constitute a significant regulatory action as defined in E.O. 12866.

PAPERWORK REDUCTION ACT

No new recordkeeping or data collection burdens are imposed upon the public as a result of this amendment. Accordingly, it is not subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.).*

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 133

Copyrights, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Trade names, Trademarks.

AMENDMENT TO THE REGULATIONS

Part 133, Customs Regulations (19 CFR Part 133), is amended as set forth below.

PART 133 – TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for Part 133 is revised to include the specific sectional authority thereunder, as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

Section 133.1 also issued under 15 U.S.C. 1096, 1124;

Sections 133.2 through 133.7, 133.11 through 133.13, and 133.15 also issued under 15 U.S.C. 1124;

Section 133.21 also issued under 15 U.S.C. 1124, 19 U.S.C. 1526;

Sections 133.24 and 133.46 also issued under 19 U.S.C. 1623;

Section 133.53 also issued under 19 U.S.C. 1558(a).

2. Section 133.43 is amended by revising paragraphs (c)(1) and (c)(4) to read as follows:

§ 133.43 Procedure on suspicion of infringing copies.

* * * * * * *

(c) * * *

(1) *Demand and bond; exchange of briefs.* If the copyright owner files a written demand for exclusion of the suspected infringing copies together with a proper bond, the district director shall promptly notify the importer and copyright owner that, during a specified time limited to not more than 30 days, they may submit any evidence, legal briefs or other pertinent material to substantiate the claim or denial of infringement. The burden of proof shall be upon the party claiming that the article is in fact an infringing copy.

(i) *Exchange of briefs.* Before timely submitting the additional evidence, legal briefs, or other pertinent material to Customs, pursuant to paragraph (c)(1) of this section, in regard to the disputed claim of infringement, the importer and the copyright owner shall first provide each other with a copy of all such information, including the importer's denial of infringement and the copyright owner's demand for exclusion. The subsequent submission of this information to Customs shall be accompanied by a written statement confirming that a copy has already been provided to the opposing party. The district director shall notify the importer and the copyright owner that they shall have additional time, not to exceed 30 days, in which to provide a response to the arguments submitted by the opposing party, and that rebuttal arguments, timely submitted, shall be fully considered in the decision-making process. During this rebuttal period and before timely submitting the rebuttal arguments to Customs, the importer and the copyright owner shall first provide each other with a copy of all such material. The submission of this rebuttal material to Customs shall be accompanied by a written statement confirming that a copy has been provided to the opposing party. The district director shall not accept any additional material from the parties to substantiate the claim or denial of infringement after the final 30-day rebuttal period expires.

(ii) *Decision.* Upon receipt of rebuttal arguments, or 30 days after notification if no rebuttal arguments are submitted, the district director shall forward the entire file, together with a sample of each style that is considered possibly infringing, to Customs Headquarters, (Attention: International Trade Compliance Division, Office of Regulations and Rulings), for decision on the disputed claim of infringement. The final decision on the disputed claim of infringement shall be forwarded to the

district director who shall send a copy thereof to the copyright owner as well as to the importer.

* * * * * * *

(4) *Withdrawal of bond.* Where the copyright owner has posted a bond on the grounds that the imported article is infringing, the copyright owner may not withdraw the bond until a decision on the issue of infringement has been reached.

* * * * * * *

GEORGE J. WEISE,
Commissioner of Customs.

Approved: October 8, 1993.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 27, 1993 (58 FR 57738)]

U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 11–1993)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of September 1993 follow. The last notice was published in the CUSTOMS BULLETIN on October 6, 1993.

Correction or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: October 19, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The lists of recordations follow:

10/13/93 U.S. CUSTOMS SERVICE PAGE 1
15:07:48 IPR RECORDATIONS ADDED IN SEPTEMBER 1993 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9300295	19930909	20130909	BONES BOOK AND SKELTON	WORKMAN PUBLISHING CO. INC.	N
COP9300296	19930909	20130909	PERFORMANCE MONITOR/2 (SPM/2) VERSION 2.0	MACHINE	N
COP9300302	19930901	20130901	TRIPLEX	KONAMI INC.	N
COP9300303	19930901	20130901	ZEN INTERGALACTIC NINJA	KONAMI INC.	N
COP9300304	19930901	20130901	WILD WEST C.O.W. - BOYS OF MOO MESA	KONAMI INC.	N
COP9300305	19930901	20130901	TRACK & FIELD	KONAMI INC.	N
COP9300306	19930901	20130901	G.I. JOE	KONAMI INC.	N
COP9300307	19930901	20130901	BUCKY O'HARE	KONAMI INC.	N
COP9300308	19930901	20130901	KID DRACULA	KONAMI INC.	N
COP9300309	19930901	20130901	TINY TOON ADVENTURES 2 TROUBLE IN WACKLAND	KONAMI INC.	N
COP9300310	19930901	20130901	ROLLERGAME	KONAMI INC.	N
COP9300311	19930901	20130901	TEENAGE MUTANT NINJA TURTLES-TURTLES IN TIME	KONAMI INC.	N
COP9300312	19930902	20130902	PREHISTORIC DINOSAUR EGGS- SIX DESIGNS	LI'L MORT SALES INC.,	N
COP9300313	19930902	20130902	STUFFED PLUSH TOY JOINTED BEAR - NO. 9559	GUND, INC.	N
COP9300314	19930908	20130908	CHEVAL	FRED S.A.	N
COP9300315	19930915	20130915	PARROT ON SWING	GEMMY INDUSTRIES CORP.	N
COP9300316	19930916	20130916	THE K.O. KID	AVIREX LTD.	N
COP9300317	19930916	20130916	TIGER IN FLIGHT	AVIREX LTD.	N
COP9300318	19930916	20130916	SILHOUETTE	AVIREX LTD.	N
COP9300319	19930916	20130916	NAVAL AIR STATION PATCH	AVIREX LTD.	N
COP9300320	19930916	20130916	MOTOR CITY SPEEDWAY	AVIREX LTD.	N
COP9300321	19930916	20130916	LINDBERGH	AVIREX LTD.	N
COP9300322	19930916	20130916	LIBERTY BELLE	AVIREX LTD.	N
COP9300323	19930916	20130916	KEEP 'EM FLYING!	AVIREX LTD.	N
COP9300324	19930916	20130916	HELMET CREST	AVIREX LTD.	N
COP9300325	19930916	20130916	FLYING TIGERS	AVIREX LTD.	N
COP9300326	19930916	20130916	EISENHOWER PATCH	AVIREX LTD.	N
COP9300327	19930916	20130916	ELECTRIC WARFARE	AVIREX LTD.	N
COP9300328	19930916	20130916	DOUBLE TROUBLE	AVIREX LTD.	N
COP9300329	19930916	20130916	COUGAR	AVIREX LTD.	N
COP9300330	19930916	20130916	AMERICAN MAID	AVIREX LTD.	N
COP9300331	19930917	20130917	TETRIS (GAME BOY PACKAGING)	NINTENDO OF AMERICA INC.	N
COP9300332	19930917	20130917	SUPER NES SUPER SET (SNES PACKAGING)	NINTENDO OF AMERICA INC.	N
COP9300333	19930917	20130917	SUPER NES CONTROL SET (SNES PACKAGING)	NINTENDO OF AMERICA INC.	N
COP9300334	19930917	20130917	NES SPORTS SET PACKAGING	NINTENDO OF AMERICA INC.	N
COP9300335	19930917	20130917	GAME BOY BASIC HARDWARE PACKAGING	NINTENDO OF AMERICA INC.	N
COP9300336	19930923	20130923	IBM PS/2 MODEL 9556/57 EPROM BASIC INPUT/OUTPUT SYSTEM	INTERNATIONAL BUSINESS MACHINES	N
COP9300337	19930923	20130923	EPROM BIOS FOR IBM PERSONAL SYSTEM/2 MODEL 9576/9577	INTERNATIONAL BUSINESS MACHINES	N
COP9300338	19930930	20130930	KEYBOARD FIRMWARE CONTROL PROGRAM	SILITEK CORPORATION	N
COP9300339	19930930	20130930	MICROSOFT MS-DOS 6 UPGRADE	MICROSOFT CORPORATION	N
COP9300340	19930930	20130930	MICROSOFT MS-DOS 6 PLUS ENHANCED TOOLS	MICROSOFT CORPORATION	N
COP9300341	19930930	20130930	DOORGUARD PROTECTOR INSTRUCTIONS	DEFENDERS NETWORKS INC.	N
COP9300342	19930930	20130930	MY BABY DINOSAUR	HONG KONG CITY TOY FACTORY LTD.	N
COP9300343	19930930	20130930	WALKING DINO	HONG KONG CITY TOY FACTORY LTD.	N
COP9300344	19930930	20130930	LITTLE LADY	HONG KONG CITY TOY FACTORY LTD.	N
COP9300345	19930930	20130930	POSABLE PATTI	HONG KONG CITY TOY FACTORY LTD.	N

SUBTOTAL RECORDATION TYPE 46

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300711	19930901	20050323	CI NO-HUB	CAST IRON SOIL PIPE INSTITUTE	N
TMK9300712	19930901	20020825	GAME LINK	NINTENDO OF AMERICA INC.	N
TMK9300713	19930901	20021020	MISCELLANEOUS DESIGN	SPORTSCUBES, L.C.	N
TMK9300714	19930901	20000424	STAMPQUBE	SPORTSCUBES, L.C.	N
TMK9300715	19930901	20000327	GOLFQUBE	SPORTSCUBES, L.C.	N
TMK9300716	19930901	20000327	PINQUBE	SPORTSCUBES, L.C.	N
TMK9300717	19930901	20090801	CADIX	CADIX INCORPORATED	N
TMK9300718	19930901	20080705	ACCORDING TO HOYLE	BROWN & BIGELOW, INC.	N
TMK9300719	19930902	19960622	BREITLING	BREITLING MONTRES S.A.	N
TMK9300721	19930902	20000403	SLT WITH LOGO	SURGICAL LASER TECHNO	N
TMK9300722	19930907	20090118	TOP-FLITE	LISCO, INC.	N
TMK9300723	19930907	20000509	SPALDING STYLIZED	LISCO, INC.	N
TMK9300724	19930908	19970716	BARBANCOURT	SOCIETE DU RHUM BARBANCOURT	N
TMK9300725	19930908	20071013	LOGO DESIGN	TOMMY HILFIGER LICENSING, INC.	Y
TMK9300726	19930909	20020128	CRESTED DESIGN	TOMMY HILFIGER LICENSING, INC.	Y
TMK9300727	19930909	20060624	TOMMY HILFIGER	TOMMY HILFIGER LICENSING, INC.	Y
TMK9300728	19930914	20151217	MISCELLANEOUS DESIGN	KRANSCO MANUFACTURING INC.	N
TMK9300729	19930914	20030413	THE MICHELANGELO COMPANY & DESIGN	THE MICHELANGELO COMPANY	N
TMK9300730	19930914	20081101	CHANEL	CHANEL, INC.	N
TMK9300731	19930914	20030413	JONI JAMES	JONI JAMES MUSIC	N
TMK9300732	19930914	20010820	CC MONOGRAM DESIGN	CHANEL, INC.	N
TMK9300733	19930914	20030330	JONI WITH DESIGN	JONI JAMES MUSIC	N
TMK9300734	19930914	20030713	JONI JAMES MUSIC	JONI JAMES MUSIC	N
TMK9300735	19930914	20001110	CHANEL	CHANEL, INC.	N
TMK9300736	19930914	20021117	CHANEL	CHANEL, INC.	N
TMK9300737	19930914	20180809	COOGI	COOGI AUSTRALIA INC.	N
TMK9300738	19930914	20021124	CC MONOGRAM DESIGN	CHANEL, INC.	N
TMK9300739	19930914	19991219	CHANEL	CHANEL, INC.	N
TMK9300740	19930915	20030713	MOKI	DAVIS DIESEL DEVELOPMENT INC.	N
TMK9300741	19930915	20030817	GASOLINE	JEANJER, LTD.	N
TMK9300742	19930915	20030102	FORT	FORT LOCK CORPORATION	N
TMK9300743	19930915	20021205	FORT LOCK CORP., WITH DESIGN	FORT LOCK CORPORATION	N
TMK9300744	19930915	20130915	911	SANCTUARY MUCH INC.	N
TMK9300745	19930915	20020519	BOUNCING BALL DESIGN	WOLVERINE WORLD WIDE	N
TMK9300746	19930915	20020428	BOUNCE AND DESIGN	WOLVERINE WORLD WIDE	N
TMK9300747	19930915	19991128	BOUNCE	WOLVERINE WORLD WIDE	N
TMK9300748	19930915	20040501	JONES NEW YORK SPORT LOGO	JONES INVESTMENT CO. INC.,	N
TMK9300749	19930917	20030615	HAYAT	HOLSA, INC.	N
TMK9300750	19930917	20030810	ELTEC	EZCONY TRADING CORPORATION	N
TMK9300751	19930917	19980308	LIFE SAVERS FIVE LABEL	NABISCO BRANDS INC.	N
TMK9300752	19930917	19970320	LIFE SAVERS	NABISCO BRANDS INC.	N
TMK9300753	19930921	20030606	WALTHER IN DESIGN	INTERNATIONAL ARMAMENT CORP.	Y
TMK9300754	19930921	20071027	PKIMA	SICURI CORPORATION	Y
TMK9300755	19930924	20040717	MARIA'S	ASIAMARK INTERNATIONAL B.V.	N
TMK9300756	19930927	20050416	MARIA'S STYLIZED AND DESIGN	ASIAMARK INTERNATIONAL B.V.	N
TMK9300757	19930930	20060819	LILLIAN LOROW	ABC DISTRIBUTING INC.	Y
TMK9300758	19930930	20080906	CAROLYN COSMETIQUE	ABC DISTRIBUTING INC.	Y
TMK9300759	19930930	20030720	BALL DEVICE	REEBOK INTERNATIONAL LTD.	N
TMK9300760	19930930	20030706	STARCREST WITH RUNNER DESIGN	REEBOK INTERNATIONAL LTD.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9300761	19930930	20030601	ABOVE THE RIM TRIANGLE DESIGN	REEBOK INTERNATIONAL LTD.	N
TMK9300762	19930930	20030518	EX-O-FIT	REEBOK INTERNATIONAL LTD.	N
TMK9300763	19930930	20030323	SPACE	RAPHAEL AMMAR	N
TMK9300764	19930930	20030525	DESIGN OF A TOY WATER GUN	LARAMI CORPORATION	N
TMK9300765	19930930	20030209	INHALATIONS	ORIGINS NATURAL RESOURCES INC.	N
TMK9300766	19930930	20021229	LET THE SUN SHINE	ORIGINS NATURAL RESOURCES INC.	N
TMK9300767	19930930	20030216	BOTANICAL TRUST CO.	ORIGINS NATURAL RESOURCES INC.	N
TMK9300768	19930930	20000710	NO PUFFERY	ORIGINS NATURAL RESOURCES INC.	N
TMK9300769	19930930	20020211	PEACE OF MIND	ORIGINS NATURAL RESOURCES INC.	N
TMK9300770	19930930	20000710	SENSORY THERAPY SECRET PLEASURES	ORIGINS NATURAL RESOURCES INC.	N
TMK9300771	19930930	20030223	SPIRITS OF THE FOREST	ORIGINS NATURAL RESOURCES INC.	N
TMK9300772	19930930	20030302	SPIRITS OF THE NIGHT	ORIGINS NATURAL RESOURCES INC.	N
TMK9300773	19930930	20030302	SPIRITS OF THE SUN	ORIGINS NATURAL RESOURCES INC.	N
TMK9300774	19930930	20000522	STARTING OVER	ORIGINS NATURAL RESOURCES INC.	N
TMK9300775	19930930	20010226	ZERO OIL	ORIGINS NATURAL RESOURCES INC.	N

SUBTOTAL RECORDATION TYPE 64

TOTAL RECORDATIONS ADDED THIS MONTH 110

APPLICATION FOR RECORDATION OF TRADE NAME: "CALIFORNIA SILK COLLECTION"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CALIFORNIA SILK COLLECTION," used by California Silk Collection, a corporation organized under the laws of the State of California, located at 4829 S. Eastern Avenue, Bell, California.

The application states that the trade name is used in connection with men and ladies garments made with silk and other nature fabric textile.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before December 27, 1993.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: October 18, 1993.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

[Published in the Federal Register, October 27, 1993 (58 FR 57894)]

APPLICATION FOR RECORDATION OF TRADE NAME: "SUPERIOR SEEDLESS GRAPE CO."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "SUPERIOR SEEDLESS GRAPE CO.," used by Sun World, Inc., a corporation organized under the laws of the State of Delaware, located at P.O. Box 1028, 53–990 Enterprise Way, Coachella, California 92236.

The application states that the trade name is used in connection with table grapes.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before December 27, 1993.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Delois P. Cooper, Intellectual Property Rights Branch, 1301 Constitution Avenue, NW., (Franklin Court), Washington D.C. 20229 (202–482–6960).

Dated: October 18, 1993.

JOHN F. ATWOOD,
Chief
Intellectual Property Rights Branch.

[Published in the Federal Register, October 27, 1993 (58 FR 57894)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–202)

PULTON CHAIN CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–08–00579

[Plaintiff's Motion for Judgment on the Agency Record granted in part. Remanded to ITA for application of the proper antidumping duty rate.]

(Dated October 18, 1993)

Arent Fox Kintner Plotkin & Kahn (Patrick F. O'Leary) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Michael S. Kane), Patrick V. Gallagher. Jr.*, Attorney Advisor, Office of the Chief Counsel for Import Administration, of counsel, United States Department of Commerce, for defendant.

OPINION

RESTANI, *Judge:* This case is before the court after a second remand determination concerning the use of best information available ("BIA") in selecting an antidumping duty rate to be applied to merchandise of plaintiff Pulton Chain Co., Inc. ("Pulton").[1] The issues presented are whether BIA should have been applied to Pulton and whether the rate chosen by the United States Department of Commerce, International Trade Administration ("ITA") was proper.

FACTS

Pulton made several shipments of roller chain, other than for bicycles, from Japan during the period of April 1, 1981 through March 31, 1983. Antidumping duties were originally assessed by the Department of the Treasury in 1973. *See Roller Chain, Other than Bicycle, from Japan,* 46 Fed. Reg. 44,488, 44,488 (Dep't Comm. 1981) (final admin. review). The law in effect from 1979 to 1984 required annual administrative reviews. Trade Agreements Act of 1979, Pub. L. No. 96–39, sec. 101, § 751, 93 Stat. 144, 175 (1979). ITA began the administrative review of the 1981–82 shipments sometime after March 31, 1982. Pulton submitted a 280–page questionnaire response on June 24, 1982 and a supplemental response on February 24, 1983. ITA requested an update to the data previously submitted for 1981–82 by mailing out questionnaires on April 1, 1983. On April 27, Pulton requested that the requirement for submitting data on computer tapes be waived because it did not keep records in that fashion. The waiver was granted and Pulton sub-

[1] The two remands were agreed to by the parties.

mitted a written 250–page response containing data for 1982–83 on June 17, 1983 and a supplemental response on December 16, 1983.

Although ITA used data submitted by Pulton to prepare a draft preliminary results notice, the notice was not published because statutory provisions eliminating the necessity for mandatory annual reviews were soon to be passed by Congress. When the domestic industry later requested a periodic review under the new law, ITA reinitiated a review on July 9, 1986. ITA did not request a new questionnaire response until almost four years later, on December 18, 1990. Pulton replied on January 17, 1991 by means of a letter, stating that it was "puzzled" by ITA's questions because an unpublished, draft preliminary notice had calculated the dumping margin to be 0%. Plaintiff's Appendix A, Pub. Doc. 20, at 1. The letter also noted that many of the relevant documents had been discarded when Pulton moved into different offices and asked ITA to "reconsider" its request for information. *Id.*

On January 25, 1991, ITA again urged Pulton to submit the necessary data. Pulton claims that an official in the Tokyo Import Attaché's office told it that a submission of no information was preferable to a partial submission. Therefore, on January 29, 1991, Pulton sent a second letter to ITA informing it that the documents were lost and no data would be forthcoming. *Id.*, Pub. Doc. 22, at 1.

ITA published preliminary results of the 1981–82 and 1982–83 annual reviews on March 7, 1991. *Roller Chain From Japan*, 56 Fed. Reg. 9674 (Dep't Comm. 1991) (prelim. admin. review). The results stated that Pulton "provided an inadequate questionnaire response originally, and then declined to respond to the supplemental questionnaire/deficiency letter or to participate further in the reviews." *Id.* at 9675. ITA proclaimed that it would resort to BIA, using "the highest rate for another manufacturer under review in these periods, 15.92 percent." *Id.* The 15.92% figure derived from the final results of the antidumping duty review of 18 other companies, published on May 13, 1987. *Roller Chain, Other than Bicycle, From Japan*, 52 Fed. Reg. 18,004, 18,005 (Dep't Comm. 1987) (final admin. review). The results assigned a 15.92% rate for several companies exporting between 1981 and 1983. One company that exported in 1979 and 1980 was assigned a rate of 43.29%. *Id.*

After ITA published the preliminary results of the 1981–82 and 1982–83 reviews, Pulton objected that ITA already had most of the information requested by ITA in the 1990 and 1991 questionnaires. ITA took the position that Pulton's prior submissions included

> no information on the value of sales which is critical in determining home market viability, inconsistent units of sale (feet in some cases, links in others), dates of sale missing on approximately 20 percent of both U.S. and home market sales, charges reported in various units with no explanation of how they relate to units of sale, * * * [and] no computer tapes.

Roller Chain from Japan, 56 Fed. Reg. 32,175, 32,177 (Dep't Comm. 1991) (final admin. review) *("Final Results").* It therefore applied the 15.92% BIA rate in its publication of final results, citing its policy to apply the higher of "(a) the highest rate for a responding firm with shipments during the period or (b) that firm's own last rate." *Id.* at 32,176 ("highest rate analysis").

Pulton challenged the final results in a suit brought before this court. ITA admitted that its choice of 15.92% as the BIA rate for Pulton under the highest rate analysis was in error and requested a remand. Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment upon the Administrative Record, at 39–40. The first remand determination resorted to a different analysis for the calculation of a BIA rate than the original determination. According to ITA, before the original results were published, it had already begun implementation of a new BIA policy, known as the two-tier policy. The two-tier policy provided that if a company refused to cooperate, ITA would apply the higher of (a) the highest rate for any firm in the original less than fair value ("LTFV") investigation, or (b) the highest rate for any firm in the subject review. If a company cooperated substantially, ITA would apply the higher of (a) the firm's LTFV rate, or (b) the highest calculated rate in the subject review. Final Results of Redetermination Pursuant to Court Remand, at 1–3 (April 5, 1993) *("First Remand Results"); see Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany,* 56 Fed. Reg. 31,692, 31,705 (Dep't Comm. 1991) (final admin. review) *("AFBs 1").*[2]

Subsequent to the issuance of the original results in the case at bar, ITA revised the policy articulated in *AFBs 1.* The new policy provided that for either cooperative or uncooperative respondents, ITA could choose to apply the highest rate in the LTFV determination *or any prior administrative review. Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France,* 57 Fed. Reg. 28,360, 28,379 (Dep't Comm. 1992) *("AFBs 2").* Contending that the revision made in *AFBs 2* was merely a clarification, ITA applied the amended two-tier policy in the first remand results and selected a BIA rate of 43.29%, which was assigned to another company in a prior administrative review. *First Remand Results,* at 4–6.

Pulton objected to the results of the first remand on the ground that ITA could not reasonably rely upon the revised two-tier policy, initiated after the final results in the *Roller Chain* determination had been reached. Pulton also argued that the 43.29% figure was never finalized and was therefore an improper BIA rate. ITA agreed that the revised two-tier policy did not apply, and consented to a second remand. Final Results of Redetermination Pursuant to Court Remand, at 5 (June 22, 1993) *("Second Remand Results").*

---

[2] The Federal Circuit has upheld ITA's use of the two-tier policy in *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1192 (Fed. Cir. 1993).

In the second remand determination, ITA noted that the two-tier policy in place at the time of the final results in *Roller Chain* restricted applicable BIA rates to either the original LTFV rate or the highest rate of any firm in the subject review. *Id.* at 3–4. Because the original LTFV determination was made by the Department of the Treasury, under the old statutory scheme, ITA had no documentation concerning the original LTFV rate and asserted that it could not rely on such a rate. *Id.* at 7. It nevertheless contended that the highest rate of any firm during the subject review was too low to "provide the incentive necessary to ensure compliance by Pulton in future reviews." *Id.* at 7–8. Clinging to the notion that BIA is determined on a case-by-case basis, ITA continued to find 43.29% to be the proper rate. Pulton protests strenuously.

DISCUSSION

I. *Applicability of BIA to Pulton:*

Congress has mandated that ITA "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). Similarly, the regulations provide for the use of BIA when ITA "(1) Does not receive a complete, accurate, and timely response to * * * [a] request for factual information; or (2) Is unable to verify * * * the accuracy and completeness of the factual information submitted." 19 C.F.R. § 353.37(a) (1991). ITA may take the cooperativeness of the party into account in determining what constitutes BIA. *Id.* § 353.37(b).

In the absence of a subpoena power, ITA must often resort to BIA in order to ensure compliance with its requests for information. *See Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990). BIA has thus been characterized as "an investigative tool, which th[e] agency may wield as an informal club over recalcitrant parties." *Id.* (quoting *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984)). Nonetheless, the ultimate purpose of BIA is not to punish non-responding parties, but to "determin[e] current margins as accurately as possible." *Id.*

Pulton claims that resort to BIA was improper in this case for four reasons. First, ITA had already compiled sufficient accurate information to prepare draft preliminary results by late 1984 and there was no subsequent change in circumstances. Second, most of the information requested by ITA was already present in its files in paper form and Pulton was not required to submit computer tapes of identical data. Third, ITA requested irrelevant information. Fourth, Pulton's refusal to provide information resulted from the alleged advice of a Department of Commerce official that no information was better than partial information.

This court cannot accept the argument that ITA's final decision should conform to the draft preliminary results prepared in 1984. In a similar case to this one, ITA had informed the plaintiffs that a forthcoming preliminary determination would calculate the antidumping mar-

gin to be *de minimis*. *Koyo Seiko Co. v. United States*, 796 F. Supp. 517, 520 (Ct. Int'l Trade 1992). Believing that the assessment of antidumping duties would soon be revoked, plaintiffs destroyed certain important documents. *Id.* at 525. The preliminary results never appeared and ITA continued its investigation, relying on BIA instead of data from the destroyed documents. *Id.* at 525–26. This court stated that while plaintiffs "may have been justified in expecting a revocation, it was never confirmed. Under these circumstances, [plaintiffs] should have retained their records." *Id.* at 525. ITA's preparation of draft results in this case cannot justify Pulton's lack of care, which led to the loss of relevant documentation during a move to different offices. Like the plaintiffs in *Koyo Seiko*, Pulton is not entitled to rely on its expectation of future agency action.

Furthermore, ITA need not reach the same result in a final determination as it did in preliminary results. The purpose of publishing preliminary results is to discover inaccuracies and correct them before coming to a final decision. *See Tehnoimportexport v. United States*, 15 CIT 250, 254, 766 F. Supp. 1169, 1175 (1991). Therefore, even if ITA had published the preliminary results as expected, Pulton could not assume that the final results would arrive at the same conclusion.

Pulton's second argument, that it submitted complete documentation in paper form and ITA could not request computerized information, must also fail. ITA concluded that there was insufficient information regarding value of sales, date of sales, inconsistent units of quantity, and no explanation of various charges such as freight charges, commissions, discounts and rebates. *Final Results*, 56 Fed. Reg. at 32,177. Although Pulton is correct that certain data were previously submitted, substantial information was lacking from the administrative record.

Pulton did provide ITA with value of sales information for the relevant period. Plaintiff's Appendix B, Conf. Doc. 1, at 2; *id.*, Conf. Doc. 3, at 2. Likewise, all reported sales to the United States or the home market seem to include dates of sale. *Id.*, Conf. Doc. 1, at 002–106; *id.*, Conf. Doc. 3, at S83,001–76, S83,137–71. On the other hand, itemized freight costs are missing from several sales reports. *Id.*, Conf. Doc. 1, at 002–106. In briefs submitted after oral argument, Pulton finally explained how to use tables attached to the sales data to determine freight and packing costs. The tables of freight charges are customer specific and tables for only the main customers are included. *Id.* at 132–35. The data is not in easily useable form. Although Pulton argues that ITA was able to calculate dumping margins for succeeding periods using Pulton's questionnaire responses, it admits that in this respect the 1981–82 response was structured differently.[3] Plaintiff's Reply to Defendant's July 28, 1993 Comments, at 6.

---

[3] An additional discrepancy in Pulton's data is that records of commissions appear in supplemental tables although Pulton's introductory explanation states that no commissions were paid. Plaintiff's Appendix B, Conf. Doc. 3, at 3, S83,111–12. Because this discrepancy also appeared in Pulton's 1983–84 response from which ITA calculated actual dumping margins, the court declines to consider it. *See* Plaintiff's Appendix D, Attachment 1, at 3, 84,015.

ITA is correct in noting that whereas most of Pulton's sales records express quantity in terms of feet, many of them use measurements such as links or pieces. Plaintiff's Appendix B, Conf. Doc. 1, at 049–069 (expressed in terms of links); *id.*, Conf. Doc. 3, at S83,144, S83,164–66, S83,171 (expressed in terms of pieces). Pulton contends that ITA could have converted the sales data to comparable units of quantity by using conversion ratios that are "common knowledge." Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record, at 30. Although Pulton demonstrates that the conversion ratios were made known to ITA by other companies in other administrative reviews, there is no evidence that ITA was informed about the conversion ratios in the course of the contested review.

It is incumbent upon the person receiving the questionnaire to provide information *"in the form requested." N.A.R., S.p.A. v. United States,* 14 CIT 409, 415, 741 F. Supp. 936, 941 (1990). In *N.A.R.*, the plaintiff's internal accounting procedures organized cost data regarding pressure sensitive plastic tape by classes of colors rather than by the length of rolls. When ITA requested calculations according to length, plaintiff refused on the ground that it had already provided cost information. *Id.* at 414, 741 F. Supp. at 941. This court upheld the use of BIA in that situation, saying "it is not sufficient that NAR provided cost information according to its internal procedures if those procedures did not produce what the ITA specifically requested."[4] *Id.* at 415, 741 F. Supp. at 941–42. The same situation exists in the present case.

ITA also requested computer tapes, but Pulton refused to submit them on the ground that ITA had no authority to make such a request. The legislative history states that ITA "may require the exporter to furnish information on computer tape if the exporter maintains records in that form, but it may not require the exporter to purchase a computer or computerize information." H.R. Rep. No. 317, 96th Cong., 1st Sess., pt. V, at 69 (1979).

It is undisputed that Pulton did not have computerized records in 1983, when the investigation began. Nevertheless, in 1990, Pulton submitted computer disks containing information for the 1983 to 1985 period as part of a separate annual review proceeding. Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record, at 25 n.52; Plaintiff's Reply Brief, at 17–18. ITA, alert to the possibility that Pulton had computerized its old data base, requested computer tapes for the 1981 to 1983 period. Pulton responded that ITA had no authority to request computer tapes. Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record, at 25. ITA is correct in charac-

[4] Cases cited by Pulton that decline to uphold the use of BIA are distinguishable. This court has found the use of BIA to be inappropriate where the party submitted too much information pursuant to unclear instructions by ITA, because ITA could analyze and reprocess the data. *Daewoo Electronics Co. v. United States,* 13 CIT 253, 266, 712 F. Supp. 931, 945 (1989). Pulton, rather than providing too much information, submitted not enough and not the right kind. In another case cited by Pulton, ITA had requested information about additional buyers in the domestic market. *Olympic Adhesives, Inc. v. United States,* 899 F.2d 1565, 1573 (Fed. Cir. 1990). When the company responded that there were no additional domestic buyers, ITA applied BIA. *Id.* ITA's decision was overturned on the ground that "a 'No' answer is not a refusal to provide data. If there is no data, 'No' is a complete answer." *Id.* The facts in Olympic Adhesives are clearly distinguishable from the present case.

terizing this behavior as recalcitrant.[5] *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) (respondent should not be allowed to withhold information based on unilateral legal conclusions).

The argument that ITA requested irrelevant information from Pulton in its second set of questionnaires has no merit. Quite simply, "[i]t is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Id.* ITA may "conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted." *N.A.R.,* 14 CIT at 415, 741 F. Supp. at 941. If a party resists ITA's control and attempts to direct the investigation itself, ITA is justified in using BIA. *Id.* By making its own determination as to the relevancy of the requested information, Pulton was improperly attempting to direct the investigation.

The final argument to be addressed is whether Pulton properly withheld information based on the advice of the Tokyo Import Attaché, who allegedly said that no information was preferable to partial information. As ITA points out, there is no actual evidence of what the Import Attaché said to Pulton's representatives. Assuming the truth of Pulton's allegation, Pulton had no right to rely on this advice in failing to respond to ITA's questionnaires. First, communications from ITA clearly stated that if Pulton did not provide the requested information, BIA would be applied. Plaintiff's Appendix A, Pub. Doc. 21, at 1. Second, regardless of the Attaché's advice, Pulton could not have submitted data that it claims to have lost in the relocation of its offices.

In conclusion, ITA correctly resorted to BIA under these circumstances. Pulton had no right to expect a final decision commensurate with the low dumping margins established in the draft preliminary results, which never appeared in the Federal Register. ITA properly found Pulton's questionnaire data to be insufficient and not in easily useable form. Pulton's obligation was to provide the data it could, explain why data not provided was unobtainable, and to explain how the data previously provided answered any new questions. It did not do this until this litigation. Thus, its response was deficient. Pulton's arguments that ITA requested irrelevant information and that a government representative advised it not to respond fully to the questionnaires do not change this conclusion.

II. *Use of 43.29% as the BIA Rate:*

In the course of several successive remands, ITA has narrowed the disputed issue of law to a very fine point. In the final determination, ITA applied the "highest rate" analysis, which used the higher of the highest rate for any responding firm with shipments during the period or the individual firm's own last rate. In asking for the first remand, ITA conceded that the "highest rate" analysis was inapplicable. It recalculated

[5] Not until oral argument did Pulton state that it had not compiled computerized data for the relevant period. This explanation should have been made to ITA.

BIA according to the revised two-tier analysis, which gave ITA the option of applying a rate from the subject review, a prior administrative review, or the original LTFV investigation. ITA then agreed to a second remand, conceding that the revised two-tier analysis had developed after the final determination in this proceeding had been issued. The original version of the two-tier analysis is thus the one that pertains to this case.

As noted in the background section, the original two-tier policy provides that if a company refuses to cooperate, ITA will apply the higher of the highest rate for any firm in the original LTFV investigation or the highest rate for any firm in the subject review. If a company cooperates substantially, ITA will apply the higher of the firm's LTFV rate or the highest calculated rate in the subject review. *See AFBs 1,* 56 Fed. Reg. at 31,705.

Pulton's one-page response to ITA's supplemental questionnaire cannot be characterized as cooperative. Plaintiff's Appendix A, Pub. Doc. 20, at 1. The letter states several unacceptable reasons for Pulton's failure to provide more data, and nowhere does it indicate a willingness to cooperate in ITA's review. *Id.* As an uncooperative respondent, Pulton could receive, as BIA, the highest rate for any firm in the original LTFV investigation. ITA has admitted, however, that it has no documentation from the original LTFV investigation, which was conducted by the Department of the Treasury under the old law. *Second Remand Results,* at 7. The parties agree that the applicable rate would be the highest calculated rate in the subject review.

In the subject review, ITA applied a BIA rate of 15.92% to several participating firms. *Final Results,* 56 Fed. Reg. at 32,177. ITA concluded, however, that 15.92% did not constitute the highest rate of any firm in the subject review, because it was not a contemporaneously calculated rate. Pulton agrees[6] and contends that it is entitled to a calculated rate of its own, which it believes to be close to zero. The court declines to require ITA to apply such a rate, because the result would "in effect reward [Pulton] for its failure to cooperate with Commerce in the investigation." *Krupp Stahl A.G. v. United States,* 822 F. Supp. 789, 793 (Ct. Int'l Trade 1993).

Pulton argues in the alternative for BIA rates of 5.22% for 1981–82 and 5.45% for 1982–83, which represent the highest rates for an exporter of the same products from the same country during the relevant time period. *Roller Chain Other than Bicycle, from Japan,* 57 Fed. Reg. 43,697, 43,703 (Dep't Comm. 1992).[7] Pulton's past actual dumping margins have varied between zero and 5%. In 1979–80, Pulton's margin was zero. 46 Fed. Reg. at 44,491. In 1980–81, the numbers ranged from zero

[6] As the parties agree that 15.92% is inapplicable, the court will not address situations in which a non-contemporaneously calculated rate may be used as the "highest rate" in the subject review.

[7] ITA complains that the 5.22% and 5.45% rates appeared in a Federal Register notice published after the date of the final determination at issue. But ITA has consented to two subsequent remands and it cannot show that it is prejudiced by the application of these rates, because the only calculated rates for the subject review in existence at the time of the determination were *de minimis. See* 52 Fed. Reg. 18,004, 18,005 (Dep't Comm. 1987) (final admin. review).

to 5%. 48 Fed. Reg. 51,801, 51,807 (Dep't Comm. 1983). The most recent final non-BIA rates calculated for Pulton were zero and 0.11%. 57 Fed. Reg. 56,319, 56,321 (Dep't Comm. 1992) (final admin. review for 1990–91).

ITA has not suggested a number that would apply on the facts of this case and under the policy applicable at the time of the final determination herein. As far as the court can determine the only BIA numbers available on the unique facts of this case, where the original LTFV margin is unusable, are the 5.22% and 5.45% figures. ITA's attempt to assert a 43.29% rate is arbitrary and capricious and has no basis in law or fact. Such a rate cannot be justified on the "case-by-case nature of BIA determinations." There is nothing in this case to indicate that 43.29% is in any way relevant, or which suggests that the 5–6% rate does not provide an appropriate incentive to comply with ITA's information requests. Finally, as is agreed by ITA, the policy in effect at the time of the original determination did not allow, as a general rule, use of another firm's rate from a prior administrative review as a BIA rate. Therefore this case should be remanded again to give ITA the opportunity to apply a rate based on the calculated rates for other exporters for the period at issue. ITA has the option of calculating actual antidumping duty rates based on Pulton's recent explanation of its data, if ITA believes it can do so with reasonable accuracy. Because of Pulton's previous lack of full cooperation, the choice is ITA's to make, based on what it considers to be administratively sound.

(Slip Op. 93–203)

FORMER EMPLOYEES OF STATE MANUFACTURING CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92–06–00414 (BN)

(Decided October 21, 1993)

[U.S. Department of Labor's decision denying plaintiffs' petition for certification of eligibility for trade adjustment assistance benefits affirmed.]

On the Motion:

Dewey Ballantine (Michael H. Stein and *Lizbeth R. Levenson*, Esqs.) for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Patricia L. Petty*, Attorney); and *Michele Curran*, Esq., U.S. Department of Labor, for defendant.

OPINION AND ORDER

INTRODUCTION

NEWMAN, *Senior Judge:* Plaintiffs, former employees of State Manufacturing Company located in New Philadelphia, Pennsylvania ("State"), contest the decision of the Department of Labor, Office of

Trade Adjustment Assistance ("Labor"), denying plaintiffs' petition for certification of eligibility for trade adjustment assistance benefits. 57 Fed. Reg. 14,434 (April 20 1992); 57 Fed. Reg. 19,993 (May 8, 1992) (petition for reconsideration of negative determination denied). This action, initiated by a letter complaint dated June 18, 1992, is before the court pursuant to 19 U.S.C. § 2395 and 28 U.S.C. § 1581(d)(1) granting this court exclusive jurisdiction to review any final determination of Labor under section 223 of the Trade Act of 1974 (19 U.S.C. § 2273) respecting the eligibility of workers for adjustment assistance under the Act.

Plaintiffs move, in conformance with CIT Rule 56.1, for a judgment on the administrative record contending that the negative determination of Labor is unsupported by substantial evidence, that Labor's determination should be reversed, and that this case be remanded to Labor for further investigation. Defendant opposes the motion and requests that Labor's determination be affirmed and that the court enter a judgment dismissing the action. The issue presented is whether Labor's negative determination, based on a 1990–91 investigation limited to State's production of Army Dress coats for the Department of Defense ("Defense"), is supported by substantial evidence on the administrative record.

Background

Plaintiffs' former employer State was a subsidiary of Target Sportswear, New York, New York ("Target"), and from 1954 to 1989 was a producer of civilian men's wearing apparel. However, according to Labor's investigation, commencing in 1989 and until October 1991 State's business comprised solely the production of army dress coats for Defense. When its military contract was completed in October 1991, State resumed production of civilian wearing apparel for approximately six months. However, a new Defense contract was not forthcoming and Target closed State's facilities early in 1992, separating 150 workers from employment.

Plaintiffs are the 150 former employees of State who filed a petition with Labor for trade adjustment assistance dated January 28, 1992. In a second petition dated February 14, 1992, the articles produced by plaintiffs were described as military green army coats and men's tailored clothing and the petition attributed State's decline in sales and production to "[n]o military contract" (R. 6).

Labor commenced an investigation of plaintiffs' eligibility for trade adjustment assistance on February 24, 1992, which investigation covered 1990 and 1991. The investigation included a telephone communication with the personnel director of State and with Defense, and information received from Target. Information collected by Labor from Defense revealed that the Department was required by law to purchase domestically manufactured Army dress coats, and therefore there was no competition from imports for the Army dress coats produced for Defense by State. Labor conducted no trade and industry analysis since it

would not be representative of the product produced by State during the period of the investigation. Labor, concededly, made no investigation regarding the effect of increased imports on State's production and sales of civilian men's clothing prior to or following the three year period during which State produced exclusively for Defense.

When investigating a petition for certification of eligibility for trade adjustment assistance, Labor must determine whether the group of workers meets the adjustment assistance eligibility requirements set forth in 19 U.S.C. § 2272. Based on Labor's 1990–91 investigation, Labor determined on April 7, 1992 that plaintiffs did not meet the adjustment assistance eligibility requirements set forth in 19 U.S.C. § 2272(a)(3) that there be "increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof [which] contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production." In that regard, Labor observed that "[t]he Defense Appropriation Act requires the U.S. military to buy Army dress coats to be purchased and produced in the United States" (Adm. Rec. Doc. 14 at 24).

Plaintiffs, through a letter dated April 17, 1992 from the Amalgamated Clothing and Textile Workers Union, requested reconsideration of Labor's negative determination on plaintiff's eligibility for trade adjustment assistance. Thus, plaintiffs stressed that Labor failed to consider that State had produced men's tailored clothing for the private market for approximately six months following completion of the Defense contract, from October 1991 through April 1992. Further, plaintiffs submitted a letter dated April 23, 1992, pointing up that State had been a producer of civilian clothing for 34 years and had produced military uniform dress coats for only 3 years. Upon reconsideration, Labor adhered to its initial negative determination, commenting on May 1, 1992 (Adm. Rec. 34):

> Investigation findings show that State Manufacturing produced only Army dress coats for the Defense Department from 1989 to October 1991, when the contract was completed. Since October 1991, State produced some incidental men's clothing for the private market. This incidental work was a stop-gap measure while they [sic] [state] waited for another defense contract. When no other defense contracts were forthcoming, State closed its plant. Since the production of men's clothing for the private market was less than one year, there was no period in which to compare State's production or sales.

DISCUSSION

The scope and standard of review in the instant case is prescribed by 28 U.S.C. § 2640(c) and 28 U.S.C. § 2395. Hence, judicial review is on the administrative record and Labor's findings of fact, If supported by substantial evidence, are conclusive. "Substantial evidence" has been defined to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Local 116 v. U.S. Secretary of Labor,*

793 F. Supp. 1094, at 1096 (1992), citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The court has carefully reviewed the administrative record, the briefs of counsel and agrees with the Government that Labor's negative determination is supported by substantial evidence and is in accordance with the law. Labor determined that plaintiffs were not eligible for trade adjustment assistance since they failed to meet the requirements of § 2272(a)(3) "that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production."

The gravamen of plaintiffs' complaint is that Labor's focus on the 1990–91 period in this case resulted, unfairly, in totally ignoring State's production and sales of civilian production, allegedly for 34 years – from 1958 to 1992. Accordingly, argues plaintiffs: "[t]he Department should have examined [State's] sales and production of men's apparel and the effect of increased imports of like products thereupon, within the context of the company's 34 year history of civilian production. Instead, the Department improperly focused solely on a single contract for the production of Army dress coats" (pl's brief 7). Plaintiffs further maintain that State's production and sales of men's wearing apparel, its historical and principal business, was adversely impacted by increased imports of wearing apparel; and that following completion of the Defense contract, such imports ultimately and importantly contributed to the closing of State's plant and separation of the plaintiff workers from their employment. Plaintiffs have additionally alleged that Target closed State's plant so that the parent company could outsource more of its production to foreign factories. Accordingly, plaintiffs complain that Labor's investigation period of 1990–91, limited to army dress coats, was inadequate in time-frame and scope, and therefore its negative determination is unsupported by substantial evidence.

Defendant, on the other hand, proffers that Labor's investigation shows that State manufactured exclusively for the military for a period from 1989 to October 1991, during which period plaintiffs remained fully employed; that following completion of the Defense contract in October 1991, State's production of men's civilian wearing apparel for six months was incidental stop-gap business pending a new Defense contract; when no new defense contract was forthcoming, State's plant was closed; and that plaintiff's separation was caused by the termination of the Defense contract with no new Defense contract forthcoming – in the words of plaintiffs' second petition, "No military contract." Labor also observed that since the production of men's clothing for the private market after termination of its defense contract was for less than a year, there was no period in which to compare State's production or sales. Based on the foregoing, defendant insists that Labor's investigatory scope and time-frame were adequate for purposes of the statute and,

consequently, Labor's negative determination is supported by substantial evidence.

The nature and extent of the investigation are within the discretion of Labor, but must be adequate to obtain the necessary information upon which to make a determination and meets a threshold requirement of reasonable inquiry. *Woodrum v. Donovan,* 4 CIT 46, 51, 544 F. Supp. 202, 206 (1982), *aff'd,* 737 F. 2d 1575 (Fed. Cir. 1984); *Estate of Finkel v. Donovan,* 614 F. Supp. 1245, 1250 (CIT 1985); *Former Employees of Hewlett-Packard Co. v. United States,* Slip Op. 93–177 (September 9, 1993), at 10. Under all the facts and circumstances the court finds that Labor's investigation was reasonable and in compliance with the statute, and that there is substantial evidence on the record to support Labor's findings. Predicated on its investigation, Labor could reasonably conclude that increased imports of civilian men's wearing apparel did not contribute importantly to the separation of plaintiffs from their employment, which would require a negative determination on plaintiffs' petition.

Even assuming that prior to 1989 State's sales or production of men's apparel decreased in response to increases in imports, the imports would not have contributed importantly to the separation of plaintiffs, as required by 19 U.S.C. § 2272(a)(3), because plaintiffs remained fully employed by State for at least another three years. Therefore, the court agrees with defendant's contention that under all the facts and circumstances plaintiffs were separated because no new Defense work was forthcoming at State and increased imports were, at best, a remote and *de minimis* cause of plaintiff's separation and not an important contributing cause, as required by the statute. *See Estate of Finkel,* 614 F. Supp. at 1251–52; *Former Employees of Hewlett-Packard Co.,* Slip Op. 93–177 at 11–14.

Accordingly, plaintiffs' motion for judgment upon the administrative record is denied, Labor's negative determination regarding plaintiffs' eligibility for trade adjustment assistance is affirmed and this action is dismissed.

(Slip Op. 93–204)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MFG. CORP., AND NTN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 91–09–00695

Plaintiffs move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. Plaintiffs specifically claim that the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), erred in (1) failing to employ a 10% maximum deviation limit on any single physical criterion employed by the ITA in its "sum of the deviations" methodology used to determine similar merchandise sold in the home market; (2) basing foreign market value of tapered roller bearing ("TRB") cups and cones sold in the United States upon prices created by splitting the price of complete bearings sold in the home market; (3) crossing over to other levels of trade in calculating foreign market value for purposes of identifying sales of such or similar merchandise; (4) refusing to make a level of trade adjustment; (5) refusing to use a period of nine months as part of its test to exclude home market sales made at prices below the cost of production; (6) not using the interest rate supplied by NTN for purposes of calculating credit expenses in Japan and inventory carrying cost in the U.S.; and (7) failing to make an adjustment to home market price for NTN's home market packing expenses.

Held: Plaintiffs' motion is granted in part and this case is remanded to Commerce to (1) apply the 10% cap to the methodology used in the final results, and (2) either recalculate NTN's credit expenses and inventory carrying cost to take into account the effect of compensating balances, or in the alternative, to substantiate on the record why it should not. Plaintiffs' motion is denied in all other respects.

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part; case remanded to Commerce.]

(Dated October 22, 1993)

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger and *Jesse M. Gerson)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Joan L. MacKenzie* and *Linda S. Chang,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Patrick J. McDonough and *Julie Chasen Ross)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NTN Bearing Corp. of America, American NTN Bearing Mfg. Corp. and NTN Corporation ("NTN"), move pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record. Plaintiffs specifically claim that the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), erred in (1) failing to employ a 10% maximum deviation limit on any single physical criterion employed by the ITA in its "sum of the deviations" methodology used to determine similar merchandise sold in the home market; (2) basing foreign market value of tapered roller bearing cups and cones sold in the United States upon prices created by splitting the price of complete bearings sold in the home market; (3) crossing over to

other levels of trade in calculating foreign market value for purposes of identifying sales of such or similar merchandise; (4) refusing to make a level of trade adjustment; (5) refusing to use a period of nine months as part of its test to exclude home market sales made at prices below the cost of production; (6) not using the interest rate supplied by NTN for purposes of calculating credit expenses in Japan and inventory carrying cost in the U.S.; and (7) failing to make an adjustment to home market price for NTN's home market packing expenses.

The administrative determination under review is the ITA's final results in *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan; Final Results of Antidumping Duty Administrative Review ("Final Results")*, 56 Fed. Reg. 41,508 (1991).

Background

On March 8, 1989, Commerce initiated an administrative review of tapered roller bearings ("TRBs") covering the period March 27, 1987 through September 30, 1988. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 54 Fed. Reg. 9,868 (1989).

In April of 1991 Commerce published its preliminary determination in the administrative review. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan; Preliminary Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 13,618 (1991).

On August 21, 1991, Commerce published its Final Results in this proceeding. *Final Results*, 56 Fed. Reg. at 41,508.

Discussion

In reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Ten Percent Deviation Cap:*

In this review, the model match methodology selected by Commerce first sought to match identical models sold in the home market and if none were found, the most similar model was selected based on the sum of the deviations methodology. In this methodology, Commerce evaluated five physical characteristics (inside diameter, outside diameter, width, load rating and the Y factor), in conjunction with a 20% variable cost of manufacture difference used as an eliminating factor or "cap."

Administrative Record ("AR") (Pub.) Doc. 228 at 2. NTN claims that Commerce's refusal to employ an additional 10% maximum deviation cap on any single physical criterion employed by Commerce in its "sum of the deviations" methodology is unsupported by substantial evidence on the record and not in accordance with law. *Plaintiffs' Motion and Memorandum in Support Thereof for Judgment on the Agency Record ("Plaintiffs' Motion")* at 10.

NTN claims that Commerce's model match methodology resulted in comparisons of commercially dissimilar U.S. and home market products contrary to the requirements of the antidumping law. NTN states that in its final results Commerce should have remained with the methodology it used in the original investigation.

In its original investigation of TRBs, Commerce implemented the 10% cap noting as follows:

> We * * * chose our selections by taking the U.S. bearing and comparing it to all bearings in the home market *in which each individual criterion deviation is 10 percent or less* * * *. This methodology relies on the physical properties of the bearings and would give interested parties a predictable basis for determining possible product matches in annual reviews under section 751 of the Act if such reviews are conducted in the future.

Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, 52 Fed. Reg. 30,700, 30,703 (1987) (emphasis added).

Commerce claims that the 10% cap is not necessary as it would eliminate from use as comparison models home market sales which overall are most similar to the U.S. TRBs. *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record* at 20.

This Court recently ruled on this issue in *Koyo Seiko Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–185 at 6–8 (Sept. 21, 1993) stating that Commerce's methodology

> must be used in conjunction with the ten percent cap to limit the permissible deviation of the criteria used to make TRB models. Commerce used the cap in its original less than fair value determination and its use avoids comparisons between products which differ so dramatically that they simply cannot be considered commercially similar.

Id. at 8.

The Court adheres to its earlier decision and, therefore, this case is remanded to Commerce to apply the 10% cap to the methodology used in the final results.

2. *Split Sales:*

NTN secondly claims that Commerce erred in basing foreign market value ("FMV") of tapered roller bearing cups and cones sold in the United States upon prices created by splitting the price of complete bearings sold in the home market. *Plaintiffs' Motion* at 14. In its final determination, Commerce "split" sales of TRB sets in the home market

into "sales" of individual cups and cones for purposes of establishing the foreign market value of cups and cones sold in the United States. *Final Results,* 56 Fed. Reg. at 41,511. NTN now claims that such splitting of sets is contrary to the statute in that it results in the use of fictitious sales and fictitious markets for purposes of establishing foreign market value. *Plaintiffs' Motion* at 14–15. According to 19 U.S.C. § 1677b(a)(1) (1988):

> In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

In the present case, Commerce explained that FMV could be determined upon the basis of home market prices of sets by apportioning the price of a set to its component parts. Commerce stated:

> Our set-splitting methodology is used to apportion the price of a set to its component parts based on a ratio of the cost of production of each part to the cost of production of the set. Set splitting was specifically upheld by the CIT [citation omitted]. At no time do we create a fictitious sale; we allot portions of the price of actual sales to their component parts.

Final Results, 56 Fed. Reg. at 41,511.

Plaintiffs' contention that the splitting of sets frustrates the antidumping law because it divests the exporter of control over its home market prices is without merit. If plaintiffs' interpretation of the statute were followed, "such interpretation would encourage importers to circumvent the antidumping laws by simply using divergent invoicing methods." *See NTN Bearing Corp. of America v. United States,* 14 CIT 623, 640, 747 F. Supp. 726, 741 (1990); *see also, Timken Co. v. United States,* 11 CIT 786, 794–95, 673 F. Supp. 495, 504–05 (1987).

These same issues were presented in *NTN Bearing Corp.,* 14 CIT 623, 747 F. Supp. 726, as well as in *Timken Co.,* 11 CIT 786, 673 F. Supp. 495, where this Court upheld Commerce's calculation of FMV for individual cups and cones by splitting the home market price for a set. The case at hand is similar and, therefore, the Court adheres to its earlier decisions and Commerce's use of the "splitting" methodology to calculate FMV is hereby affirmed.

3. *Levels of Trade:*

NTN also contests Commerce's comparison of U.S. and home market sales across different levels of trade. *Plaintiffs' Motion* at 28. During the review, Commerce first searched for such or similar merchandise at the same level of trade and, if none could be found, then at different levels of trade. NTN claims that Commerce's comparison of U.S. and home market sales "across different levels of trade" is not supported by substantial evidence and is contrary to law.

This Court on several occasions has affirmed Commerce's selection of most similar merchandise sold in the home market when alternative

levels were unavailable. *See Koyo Seiko Co.*, 17 CIT at ____, Slip Op. 93–185 at 8; *Koyo Seiko Co. v. United States*, 17 CIT ____, 810 F. Supp. 1287 (1993); *Timken Co. v. United States*, 10 CIT 86, 630 F. Supp. 1327 (1986); *NTN Bearing Corp.*, 14 CIT 623, 747 F. Supp. 726; *Timken Co.*, 11 CIT 786, 673 F. Supp. 495; *Koyo Seiko Co. v. United States*, 16 CIT ____, 796 F. Supp. 1526 (1992).

This Court refused to recognize a "level of trade" argument similar to NTN's in *NTN Bearing Corp.*, 14 CIT at 634, 747 F. Supp. at 736, stating:

> With respect to plaintiffs' contention that the ITA's disregard of levels of trade differences is contrary to law, plaintiffs have not provided, nor has the court uncovered any support for this argument. To the contrary, this court has noted previously that there is no statutory mandate requiring Commerce to remain within the same levels of trade while effecting its "such or similar merchandise" determination.

In this case, plaintiffs similarly have no basis for requesting that the Court require Commerce to limit its comparisons by the level of trade in which the sales occur.

Thus, the Court adheres to its earlier decisions and, therefore, Commerce's comparison of sales across different levels of trade was in accordance with law.

4. *Level of Trade Adjustment:*

NTN alternatively claims that if Commerce were to cross trade levels when selecting such or similar merchandise, Commerce should make an appropriate adjustment for differences in the two trade levels pursuant to 19 C.F.R. § 353.58 (1991), which states:

> The Secretary normally will calculate foreign market value and United States price based on sales at the same commercial level of trade. If sales at the same commercial level of trade are insufficient in number to permit an adequate comparison, the Secretary will calculate foreign market value based on sales of such or similar merchandise at the most comparable commercial level of trade as sales of the merchandise and *make appropriate adjustments for differences affecting price comparability.*

(Emphasis added).

Accordingly, NTN now asks the Court to remand this case to Commerce with instructions to explain why NTN's request for a level of trade adjustment based on price is inadequate and also to consider a level of trade adjustment based on differences in price rather than expense alone. *Plaintiffs' Motion* at 35–36.

In the present case, however, Commerce explained to the satisfaction of this Court its rejection of NTN's claim for a level of trade adjustment based on price:

> NTN's contention that a level of trade adjustment should be based on the measurable difference in prices across levels does not address the issue of whether the difference in price is due purely to the

> difference in level of trade, or whether any other factors are affecting the difference in price. The only quantifiable information submitted by NTN that accounts for the difference in prices across levels of trade are selling expenses. Because we already make adjustments for direct selling expenses, it would be double counting to deduct them again in the context of a level of trade adjustment. Therefore, where comparison sales in the home market were insufficient at the same level of trade as the U.S. sale, we crossed levels of trade in search of such or similar merchandise, and allowed a level of trade adjustment to FMV based only on the difference in indirect selling expenses between levels of trade for NTN.

Final Results, 56 Fed. Reg. at 41,512.

Thus, Commerce concluded that the only quantifiable information submitted by plaintiffs that accounts for the difference in price across levels of trade is selling expenses and since direct selling expenses were already deducted, Commerce found that a deduction of indirect selling expenses was the only basis for a level of trade adjustment. *Id.* The Court agrees and finds that Commerce acted reasonably and hereby affirms its decision on this issue.

5. *Below Cost Sales:*

NTN also claims that Commerce erred in using a period of three months to determine whether sales were made below cost over an extended period of time. *Plaintiffs' Motion* at 45. NTN asserts that three months is not an extended period of time and claims that Commerce should have used a period of nine months as part of its test to exclude home market sales made at prices below the cost of production from price comparisons to sales in the U.S. *Id.*

According to 19 U.S.C. § 1677b(b) (1988):

> Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production –
>
> (1) have been made over an *extended period of time* and in substantial quantities, and
>
> (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,
>
> such sales shall be disregarded in the determination of foreign market value.

(Emphasis added).

Plaintiffs claim that an "extended period of time" means an "amount of time that represents at least the majority of the period." *Plaintiffs' Motion* at 45. To support this contention, however, plaintiffs merely consulted a dictionary defining "extended" as "covering a great extent of time." *Id.* at 45–46.

In its final results, Commerce rejected this proposition claiming that 19 U.S.C. § 1677b(b)

> is designed to ensure that below-cost sales are not disregarded if these sales occurred over a short period of time or resulted from normal business practices, such as selling obsolete or end-of-year merchandise at below-cost prices. TRBs are a commodity item that do not demonstrate perishability, seasonality, or frequent generational changes in models. No information on the record in this case indicates that below-cost sales are a normal practice or characteristic in the industry. We used the period of three months to define an extended period of time since three months is commonly used to measure corporate, financial and economic performance. Use of three months to measure frequency of below-cost sales shows that sales below the cost of production are not random, accidental or sporadic. This time measurement also ensures that the Department uses home market prices that are above the cost of production in its price-to-price comparisons in all but random or sporadic situations.
>
> Therefore, we have determined below-cost sales occurring in three or more months of the review period to have been made over an extended period of time.

Final Results, 56 Fed. Reg. at 41,516.

Furthermore, Commerce indicates that 19 U.S.C. § 1677b(b) is silent as to what constitutes an "extended period of time" within the meaning of the statute. Considering this and Commerce's complete explanation on the record, this Court agrees with Commerce on this issue and rules that it acted reasonably and in accordance with law. Therefore, Commerce's determination as to this issue is hereby affirmed.

6. *Credit Expenses:*

Plaintiffs also claim that Commerce erred by not using the interest rate supplied by NTN for purposes of calculating credit expenses in Japan and inventory carrying cost in the U.S. NTN claims that compensating deposits were a factor affecting the net credit cost reported. *Plaintiffs' Motion* at 47. Compensating deposits or balances "are bank deposits held as security for outstanding loans. Many banks require a borrower to maintain an average account balance equal to a percentage of the outstanding loan, which effectively raises the real interest rate on the loan." *See Timken Co. v. United States*, 16 CIT ____, ____, 809 F. Supp. 121, 124 (1992); *see also, PPG Indus., Inc. v. United States*, 14 CIT 522, 526 n.8, 746 F. Supp. 119, 124 n.8 (1990).

In *Timken Co.*, 16 CIT at ____, 809 F. Supp. at 124, Commerce found the deposit of compensating balances a requirement of NSK's loan agreements and, therefore, granted a corresponding adjustment in the home market credit costs necessary for maintenance of a credit line. The Court in that case found that the evidence on the record failed to clearly show whether funds deposited with NSK's bank were deposited as a prerequisite for obtaining loans and the Court remanded the case to Commerce to substantiate whether the amounts deposited by NSK were in fulfillment of the bank's requirement. *Id.*

In this case, Commerce conversely has not justified why it should not consider plaintiffs' information on credit costs. In its Final Results, Commerce merely states that

> there is inadequate justification to accept NTN's credit cost calculation based on compensating deposits. In our preliminary results we recalculated NTN's credit costs based on the firm's net interest expense * * * as most representative of the firm's internal cost of funds.

Final Results, 56 Fed. Reg. at 41,513.

Therefore, this case is remanded to Commerce to either recalculate NTN's credit expenses and inventory carrying costs to take into account plaintiffs' information on compensating balances or, in the alternative, to substantiate on the record why it should not.

7. *Home Market Packing Expenses:*

Finally, plaintiffs claim that Commerce erred in failing to make an adjustment to home market price for NTN's home market pricing expenses. Commerce stated at the administrative level that NTN's adjustment for home market packing costs should be rejected because respondent did not supply adequate information on these costs. *Final Results,* 56 Fed. Reg. at 41,512.

On August 6, 1990, in its supplemental questionnaire response NTN supplied Commerce with cost information relating to packing expenses incurred by one cost center. AR (Pub.) Doc. 95. NTN stated:

> Packing expense is incurred at several of the cost centers listed on Exhibit B–2. It would be unduly burdensome for NTN to submit detailed accounting breakdown for each of the cost centers. Instead, NTN is supplying as Appendix 4 a sample of the packing expenses incurred for one of the cost centers.

Id. at 8. NTN further stated that "[s]imilar information can be provided at the time of the verification if the ITA feels that such data is of any use." *Id.*

NTN now claims that since Commerce decided not to verify and did not request any additional information regarding packing expenses, then Commerce was satisfied with NTN's response. *Plaintiffs' Motion* at 51.

Commerce, on the other hand, argues that even if it chose to verify, verification would have been too late for NTN to supply any missing data pursuant to 19 C.F.R. § 353.31 (1991) which states in pertinent part:

> **§ 353.31 Submission of factual information.**
>
> (a) *Time limits in general.* (1) Except as provided in paragraphs (a)(2) and (b) of this section, submissions of factual information for the Secretary's consideration shall be submitted not later than:
>
> (i) For the Secretary's final determination, seven days before the scheduled date on which the verification is to commence;
>
> (ii) For the Secretary's final results of an administrative review under § 353.22 (c) or (f), the earlier of the date of publication of no-

tice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review; or

* * * * * * *

(2) Any interested party * * * may submit factual information to rebut, clarify, or correct factual information submitted by an interested party * * * at any time prior to the deadline provided in this section for submission of such factual information or, if later, 10 days after the date such factual information is served on the interested party * * *.

(3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit.

Furthermore, it is the respondent who bears the burden of establishing that it is entitled to an adjustment by supplying the agency with adequate information upon which to base its decision. *See* 19 C.F.R. § 353.54;[1] *NSK Ltd. v. United States,* 17 CIT ____, ____, 825 F. Supp. 315, 321, (1993); *Koyo Seiko Co.,* 16 CIT at ____, 796 F. Supp. at 1530; *Timken Co.,* 11 CIT at 804, 673 F. Supp. at 513. It is not Commerce's job to plead with a respondent to submit detailed information. Therefore, this Court holds that Commerce acted reasonably in not making an adjustment to home market price for NTN's packing expenses.

CONCLUSION

In accordance with the foregoing opinion, plaintiffs' motion for judgment on the agency record is granted in part and this case is remanded to Commerce to (1) apply the 10% cap to the methodology used in the final results, and (2) either recalculate NTN's credit expenses and inventory carrying cost to take into account the effect of compensating balances or, in the alternative, to substantiate on the record why it should not. Remand results are due within thirty (30) days of the date this opinion is entered. Comments to remand results are due fifteen (15) days after the date the remand results are issued, and responses to the comments are due within fifteen (15) days thereafter. Plaintiffs' motion is denied in all other respects.

---

[1] "Any interested party that claims an adjustment * * * must establish the claim to the satisfaction of the Secretary." 19 C.F.R. § 353.54.

(Slip Op. 93–205)

MITSUBOSHI BELTING LTD. AND MBL (USA) CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND GATES RUBBER CO., INTERVENOR-DEFENDANT

Court No. 93–06–00356

[Defendant's motion to dismiss granted.]

(Decided October 22, 1993)

Sonnenberg, Anderson & Rodriguez (Steven P. Sonnenberg, Paul S. Anderson and *Jacqueline M. Paez)* for the plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* and *Stacy J. Ettinger,* U.S. Department of Commerce, of counsel, for the defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart and *James R. Cannon, Jr.)* for the intervenor-defendant.

OPINION

AQUILINO, *Judge:* Following publication by the International Trade Administration, U.S. Department of Commerce ("ITA") of *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan; Final Results of Antidumping Duty Administrative Review,* 58 Fed.Reg. 30,018 (May 25, 1993), the above-encaptioned action commenced with timely service and filing of a summons and complaint. These pleading(s) were accompanied by an application for a preliminary injunction, suspending liquidation of the entries of plaintiffs' indicated merchandise covered by the administrative review.

The defendant responded with papers in opposition to such suspension and in support of dismissal of this action for lack of jurisdiction.

I

On its face, the complaint does not contest the final results *per se* of the administrative review. Rather, plaintiffs' precise prayer for relief is that the court

> hold unlawful the issuance of liquidation instructions by the ITA pending the decision in *Bando Chemical Industries Ltd.* * * * *v. United States,* CIT Court No. 89–07–00399.
>
> Furthermore, upon a decision in *Bando* by the CIT that the ITC record did not support a finding of threat of material injury and that such a finding is not in accordance with the law, the Plaintiff respectfully requests this Court to hold unlawful the Final Results by the ITA.

The complaint correctly alleged that the *Bando* case was pending in this Court of International Trade and that it contested

> the final affirmative determination rendered by the U.S. International Trade Commission ("ITC") in Industrial Belts from Japan, Investigation No. 731–TA–414.

> 11. If the CIT finds in *Bando* that there was not substantial evidence on the record to support a finding of threat of material injury to a domestic industry from imports of industrial belts imported from Japan, and that such finding is otherwise not in accordance with law, the Antidumping Duty Order issued by the Commerce Department will be revoked, and no antidumping duties will be assessed on industrial belts imported from Japan.

However, subsequent to the filing of the complaint, on August 6, 1993 the court handed down Slip Op. 93–150, 17 CIT in *Bando* (and in *Pirelli Trasmissioni Industriali, S.p.A. v. United States,* CIT No. 89–07–00430), affirming the views after remand of ITC Commissioner David B. Rohr that the domestic industries for power-transmission belts are threatened with material injury by reason of imports from Japan (and Italy). The effect of this affirmance was to confirm the determination of material injury by the ITC. *See generally Bando Chemical Industries, Ltd. v. United States,* 16 CIT ____, 787 F.Supp. 224 (1992).

The issuance of Slip Op. 93–150 was followed by a registered letter to the court from plaintiffs' counsel, pointing out that the parties in those actions had 60 days to appeal the court's judgments therein and also that:

> If the plaintiffs in *Bando Chemical* do not appeal the CIT's decision, there will be no case or controversy in the present action. In that event, plaintiffs would voluntarily dismiss the present action.

The stated, salutary purpose of the letter was orderly procedure. After the *Bando* (but not the *Pirelli)* plaintiffs did indeed file a notice of appeal, this court conferred with the parties herein and concluded to hold a hearing on October 14, 1993 on plaintiffs' application for a preliminary injunction and defendant's motion to dismiss.

II

As indicated above, the focus of defendant's original papers in support of dismissal is lack of jurisdiction. However, in their subsequent reply and at the hearing counsel broadened the bite of the motion to dismiss to encompass failure to state a claim upon which relief can be granted.

A

The gist of the government's position as to jurisdiction is (1) that 19 U.S.C. § 1516a(a)(2)(A) permits interested parties to proceedings like the above-referenced administrative review to contest in court "any factual findings or legal conclusions upon which the [review's resultant] determination is based", to quote from that section of the statute, but (2) that the complaint does not in fact challenge any such findings or conclusions.

It is clear that the plaintiffs do not aim this action at either of those two areas. Rather, their complaint is concerned with the effect of the ITA's determination, which could lead to liquidation of their entries before the lawfulness of the underlying antidumping-duty order is finally

determined on judicial review. The plaintiffs therefore rely primarily on 19 U.S.C. § 1516a(c)(2), to wit:

> **(c) Liquidation of entries**
>
> * * * * * * *
>
> **(2) Injunctive relief**
>
> In the case of a determination described in paragraph (2) of subsection (a) of this section by the [ITA] * * *, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the [ITA] * * * upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

Any waiver of a sovereign's immunity is to be strictly construed. However, the construction for which defendant's counsel argue in this action is stricter than either the statutory waiver or the case law requires. On its face, and necessarily, foregoing subsection (c)(2) is tied to determinations described in subsection (a)(2), including that which precipitated plaintiffs' complaint herein, but not so narrowly as to require the reading the defendant now presses. Indeed, the grant of exclusive jurisdiction to this Court of International Trade over matters such as this by the Customs Courts Act of 1980 refers broadly to "any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c).

In exercising that jurisdiction pursuant to the Trade Agreements Act of 1979, as amended, and the 1980 enactment, the court in *Sonco Steel Tube Div., Ferrum, Inc. v. United States,* 12 CIT 990, 698 F.Supp. 927 (1988), rejected a restrictive reading of those statutes by government counsel. In attempting in that case to limit the scope of injunctive relief pursuant to 19 U.S.C. § 1516a(c)(2), they had argued that such relief could be granted in regard to ITA determinations after administrative review under 19 U.S.C. § 1675 and not to predicate agency determinations of sales at less than fair value. The plaintiff had challenged the antidumping-duty order[1] but had not requested any administrative review thereof, thereby making its entries of covered goods susceptible to liquidation at the rate developed during the ITA's original investigation. The count held injunction of liquidation in such a situation to comply with the statutory scheme. *See* 12 CIT at 995, 698 F.Supp. at 931.

In *Asociacion Colombiana de Exportadores de Flores v. United States,* 916 F.2d 1571, 1577 (Fed.Cir. 1990), the court of appeals relied on this decision in *Sonco:*

> * * * The statute authorizes the Court of International Trade to enjoin liquidation of entries covered by an [ITA] antidumping order, the validity of which is being judicially challenged or which has been judicially invalidated.
>
> There is no reason to give the broad statutory language the narrow meaning the government ascribes to it. To the contrary, the

[1] *See Sonco Steel Tube Div., Ferrum, Inc. v. United States,* 12 CIT 745, 694 F.Supp. 959 (1988).

> statute broadly empowers the Court of International Trade to enjoin liquidations of entries covered by determinations of the [ITA].

The facts in that case revealed continuing judicial review of an antidumping-duty order at the time of commencement of an administrative review thereof. Upon such initiation, the ITA ordered liquidation of all entries for which agency review had not been requested. And it was that order which was held within the jurisdiction of the court(s) to enjoin.

In fact, the Federal Circuit began its opinion in *Asociacion Colombiana* by referring to the "authority" of the Court of International Trade to enjoin liquidation. 916 F.2d at 1572. This reference itself was in keeping with the discussion in *Sonco,* wherein the court had sought to remind counsel:

> It is probably a mischaracterization to label these arguments "jurisdictional" in the traditional sense of that term. Rather, the parties are arguing about what specific actions the court may take in a particular case according to the statutory scheme and Congressional intent. No one has argued that this court lacks personal jurisdiction over the parties or that the court lacks subject matter jurisdiction over the underlying case.

12 CIT at 991, n. 1, 698 F.Supp. at 928, n. 1.

Indeed, it is also appropriate to remind defendant's attorneys that in an earlier action between the same parties at bar and involving the same underlying antidumping-duty order, the government conceded jurisdiction, if not under 28 U.S.C. § 1581(c), then pursuant to section 1581(i). *See MBL (USA) Corporation v. United States,* 14 CIT 161, 164 and n. 9, 733 F.Supp. 379, 382 and n. 9 (1990). Whatever defendant's posture now, the court is not persuaded that it lacks jurisdiction over the above-encaptioned action, which appears to be an extension of this litigation.

B

This circumstance also makes it necessary to recall that *MBL (USA) Corporation v. United States* resulted in partial summary judgment for the government, dismissing the second count of plaintiffs' amended complaint. To recite salient facts in the record, power-transmission belts from Japan, including those of the plaintiffs, were the object of a dumping investigation by the ITA and the ITC. The corporations participated in the administrative proceedings as parties respondent[2], with their counsel having filed a notice of appearance before the ITC, stating, among other things, that they "intend[ed] to participate fully in the [ ]

---

[2] Section 1677(9) of 19 U.S.C. defines "interested party" for purposes of Title VII of the Tariff Act of 1930, as amended, in part as

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle or a trade or business association a majority of the members of which are importers of such merchandise[.]

investigations and to file briefs and statements with the Commission." Thereafter, however, those lawyers sent a letter to the ITC reporting:

> On instructions from our clients * * *, we hereby withdraw their appearance as parties in this investigation. We likewise withdraw the notice of appearance at the hearing in this matter filed last week. Our clients will not be filing briefs in this matter, through counsel or otherwise, nor will they or their attorneys or representatives be appearing at the hearing in this matter.

The Commission reacted accordingly, serving copies of this withdrawal statement on all other parties.

The investigations resulted in publication of *Antidumping Duty Order of Sales at Less Than Fair Value; Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan,* 54 Fed.Reg. 25,314 (June 14, 1989), and then in the service and filing of a complaint in court by the plaintiffs, contesting the effective date of the order. Thereafter, the plaintiffs filed the amended complaint, adding a second count which sought to contest the affirmative injury determination of the ITC underlying the order. The defendant responded with a motion for summary judgment on that count, arguing, among other grounds, that the plaintiffs lacked standing to contest the injury determination.

This court concurred. Among other things, the court found that the plaintiffs had abandoned the proceedings before the Commission and recited the principle that issues not raised in a forum *nisi prius* cannot be raised on appeal. The court further found that their amended complaint had been served and filed beyond the time allowed to invoke judicial review and concluded that their summons and original complaint had not stopped the running of the 30–day statutory period as against the ITC, quoting *Georgetown Steel Corporation v. United States,* 801 F.2d 1308, 1312 (Fed. Cir. 1986):

> Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions. *Lehman v. Nakshian,* 453 U.S. 156, 161, 101 S.Ct. 2698, 2701, 69 L.Ed.2d 548 (1981). If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit." *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed. 2d 607 [1980] (quoting *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941)).

Of course, it is also axiomatic that, when deciding a motion to dismiss, a complaint is to be liberally construed in favor of a plaintiff. *E.g., Jenkins v. McKeithen,* 395 U.S. 411, 421–22, *reh'g denied,* 396 U.S. 869 (1969), and cases cited therein. Taking that approach in this action, however, does not lead the court to conclude that plaintiffs' present pleading raises any issue not already decided against them in *MBL (USA) Corporation v. United States, supra.* The aim then and now is

judicial vacation of the ITC's affirmative determination. Some interested parties to the proceedings before the Commission have preserved their standing to pursue that relief. The plaintiffs, on the other hand, did not and have not. The formal adjudication of their lack of standing in 1990 has not been overcome by the current complaint.[3] That is, the court concludes that it fails to state a claim upon which relief can be granted. Indeed, even if the question of standing were not foreclosed as a matter of law, the plaintiffs have failed to show how the issuance of liquidation instructions by the ITA would be unlawful as to them simply because the parties in other litigation are still availing themselves of the right to further judicial appeal. As plaintiffs' counsel have indicated in their registered letter herein, and quoted above, without that appeal in *Bando* there would be no conceivable case or controversy in the present action.

III

To summarize the foregoing, plaintiffs' complaint is too attenuated to amount to a claim upon which any relief can now be granted[4], and defendant's motion to dismiss must therefore be granted. Judgment will enter accordingly.

---

[3] In fact, plaintiffs' memorandum in opposition to defendant's motion to dismiss admits (at page 10) that they "do not have standing to challenge the ITC's affirmative injury determination."

[4] Having reached this conclusion, the court need not address plaintiffs' application for a preliminary injunction and simply notes in passing that the merits of its Slip Op. 93–150 in *Bando* and *Pirelli* do not favor the plaintiffs herein and that there does not seem to be a substantial likelihood of reversal on appeal. *Cf. FMC Corporation v. United States*, No. 92–1366, Slip Op. at 6–7 (Fed.Cir. Aug. 19, 1993) ("Absent a showing that a movant is likely to succeed on the merits, we question whether the movant can ever be entitled to a preliminary injunction unless some extraordinary injury or strong public interest is also shown").

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/122 10/19/93 Aquilino, J.	Automotive International, Inc.	90–03–00151	407.1610, 402.36 Various rates	407.16, 407.19, 407.05 Various rates	Agreed statement of facts	Cincinnati Rust-inhibitor applied to automobiles (Waxoyl and Master-Shield)
C93/123 10/19/93 Aquilino, J.	Baxter Healthcare, Corp.	90–08–00427	9018.90.7070 4.2%	9817.00.9600 Duty-free	Agreed statement of facts	Norfolk, VA Miniprime sets, CCPD sets and disconnect sets
C93/124 10/19/93 Aquilino, J.	Travenol Laboratories, Inc.	90–03–00112	709.1790 4.2%	870.67 Duty-free	Agreed statement of facts	Norfolk, VA Miniprime sets, CCPD sets and disconnect sets
C93/125 10/20/93 Tsoucalas, J.	Montgomery Ward & Co., Inc.	91–05–00362	8712.00.10 11%	8712.00.20 5.5%	Agreed statement of facts	Los Angeles Bicycles from Taiwan, Montgomery Ward model numbers 80894; 81894; 80806; 81806; 80818; 81818; 80801; 81801
C93/126 10/20/93 Tsoucalas, J.	Montgomery Ward & Co., Inc.	91–05–00363	732.24 11%	732.18 5.5%	Agreed statement of facts	Los Angeles Bicycles from Taiwan, Montgomery Ward model numbers 80862; 81862; and 80806
C93/127 10/20/93 Tsoucalas, J.	Montgomery Ward & Co., Inc.	92–03–00188	8712.00.10 11%	8712.00.20 5.5%	Agreed statement of facts	Los Angeles Bicycles from Taiwan, Montgomery Ward model numbers 80801; 81801; 80862; 81862; 80802; and 81802

ABSTRACTED CLASSIFICATION DECISIONS – Continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/128 10/20/93 Tsoucalas, J.	Montgomery Ward & Co., Inc.	92–11–00737	8712.00.10 11%	8712.00.20 5.5%	Agreed statement of facts	Los Angeles Bicycles from Taiwan, Montgomery Ward model numbers 80801; 81801; 80894; and 81894
C93/129 10/21/93 Musgrave, J.	Fabil Manufacturing, Co.	86–07–00944	Various provisions of Schedule 3, TSUS Various rates	376.56 Various rates	Agreed statement of facts	New York Clothing jackets with style numbers: 75, 76, 76A, 9328, 9329, 9382

Index

Customs Bulletin and Decisions
Vol. 27, No. 45, November 10, 1993

U.S. Customs Service

Treasury Decision

	T.D. No.	Page
Copyright infringement actions, exchange of briefs; final rule; part 133, CR amended	93–87	1

General Notices

	Page
Copyright, trademark, and trade name recordations, No. 11–1993, September 1993	9
Trade name, application for recordation; solicitation of comments:	
California Silk Collection	13
Superior Seedless Grape Co.	14

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Former Employees of State Manufacturing Co. *v.* United States	93–203	25
Mitsuboshi Belting Ltd. *v.* United States	93–205	39
NTN Bearing Corp. of America *v.* United States	93–204	30
Pulton Chain Co., Inc. *v.* United States	93–202	17

Abstracted Decisions

	Decision No.	Page
Classification	C93/122–C93/129	45

U.S. G.P.O. 1993–301–610–60070